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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DEBORAH B. and DANNY B., Appellants, v. ALYSSA C., Appellee.	2 CA-JV 2009-0101 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. AD200900004

Honorable Stephen M. Desens, Judge

VACATED AND REMANDED

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V Á S Q U E Z, Judge.

¶1 In this appeal, the maternal grandmother and step-grandfather of Zoie C. challenge the juvenile court's August 2009 order setting aside a decree of adoption the court had previously entered in their favor.

Factual and Procedural Background

¶2 Appellant Deborah B. is the mother of Alyssa C. and thus the grandmother of Alyssa's daughter Zoie, born in August 2006. Deborah is married to appellant Danny B., Alyssa's stepfather. On January 6, 2009, Alyssa executed a written, notarized Consent to Adoption, agreeing to Zoie's adoption by Deborah and Danny ("the grandparents"). The grandparents filed a petition to adopt Zoie, together with Alyssa's consent to the adoption, on January 23, 2009.[1] After a hearing on April 6, 2009, the juvenile court granted the petition and entered a formal decree of adoption.

¶3 In June 2009, Alyssa moved to set aside the adoption, alleging primarily that her consent had been obtained through fraud, coercion, and duress. After holding an evidentiary hearing on July 21 and August 10, 2009, the juvenile court entered a written order on August 19, 2009, granting Alyssa's motion and vacating the adoption decree. The court based its ruling solely on its finding that Alyssa had not been served with notice of the April 6 adoption hearing as required by A.R.S. § 8-111. Noncompliance with § 8-111, it concluded, had deprived the court of jurisdiction to grant the petition for adoption. It is from that order that Deborah and Danny now appeal.

¶4 The grandparents raise the following four issues on appeal: (1) whether the juvenile court erred as a matter of law in finding Alyssa had not waived her right to notice of the adoption hearing for purposes of § 8-111(4); (2) whether the court erred in

[1]Alyssa was never married to Zoie's father, Christopher J. His parental rights to Zoie were terminated on February 23, 2009, in a separate proceeding, Cochise County cause number JS200800014, based on the juvenile court's finding that Christopher had abandoned Zoie.

vacating the adoption decree based on an erroneous conclusion that it had lacked jurisdiction to enter the decree; (3) whether the court abused its discretion by failing to make an express finding that the consent to adopt had been obtained through fraud, duress, or undue influence pursuant to A.R.S. § 8-106(D); and (4) whether the court abused its discretion by failing to hold a contested hearing on the petition for adoption and receiving evidence concerning Zoie's best interests. We reach only the first two, interrelated issues and reverse because the court's stated findings do not support its order.

Discussion

¶5 The procedure for moving to set aside a final order of adoption is governed by Rule 85, Ariz. R. P. Juv. Ct. As pertinent here, Rule 85(A) provides that a motion to set aside "shall allege grounds only as permitted by Rule 60(c), Ariz. R. Civ. P."[2] Rule 85(G) requires the court to "make its findings in writing, in the form of a minute entry or order." And subsection (D) of Rule 85 provides that the movant has the burden "to prove the allegations contained in the motion by clear and convincing evidence."

¶6 Although Alyssa alleged in her motion to set aside the adoption "that she signed the consent to the adoption under fraud, coercion, and duress, and that she was

[2]Pursuant to Rule 60(c), grounds for relieving a party from the operation of a final judgment include "surprise," Rule 60(c)(1); "fraud . . . , misrepresentation or other misconduct of an adverse party," Rule 60(c)(3); and "any other reason justifying relief from the operation of the judgment," Rule 60(c)(6). Pursuant to A.R.S. § 8-106(D), a consent to adoption "is irrevocable unless obtained by fraud, duress or undue influence." As we discuss below, although the parties and the court have largely conflated the two issues, whether grounds exist to set aside the final adoption decree is a separate question from whether Alyssa's consent to Zoie's adoption was valid and irrevocable pursuant to § 8-106(D).

unaware that she was signing a consent for her child to be adopted by Deborah," the juvenile court in its ruling made no findings with respect to those allegations or the validity of the notarized consent. The motion to set aside also alleged, less prominently, that Deborah had not provided Alyssa with notice "that a hearing to finalize the adoption was going to take place on April 6, 2009," in derogation of the notice requirement in § 8-111. The court found, "[a]s a matter of law, A.R.S. § 8-111 has not been complied with in this action in that notice of the April 6, 2009, adoption hearing was not served on [Alyssa] in the same fashion as the service of process in civil actions nor was a waiver of notice of hearing 'filed before the hearing.'"[3]

¶7 Even though Alyssa's written consent to adoption did not contain an express waiver of notice of the adoption hearing and no separate, written waiver of notice

[3]Section 8-111 provides, in pertinent part:

> After a petition to adopt has been filed, the clerk of the superior court shall set a time and place for a hearing by the court. Notice shall be as provided for the service of process in civil actions to:
>
> 1. The petitioner.
> 2. The agency, if any.
> 3. The person or agency conducting the social study required by § 8-112.
> 4. Any person or agency required to give consent by § 8-106 unless consent with a waiver of notice of hearing has been filed before the hearing.

was ever filed,[4] she nonetheless had personally waived her right to appear at the adoption hearing. On February 23, 2009, she had appeared before the court telephonically and testified in support of the petition to terminate Zoie's father's parental rights. After the court had ordered Christopher's rights terminated, the following exchange occurred among the court, Alyssa, and counsel for Deborah and Danny:

> THE COURT: Let me suggest this, as well. I know that since we have completed this matter, we just simply have to wait 15 days until we see if there is an appeal of the Court's order, but we need to set the adoption matter in this court, as well.
>
> [COUNSEL]: Okay. What I was going to suggest to Alyssa, since we have her on the phone, so she doesn't have to leave her employment again to appear at that adoption hearing, if she would be willing to waive her appearance because she is, in fact, consenting to her parents adopting Zoie.
>
> THE COURT: Would you do that, ma'am?
>
> [ALYSSA]: Yes.
>
> THE COURT: You remain under oath. You understand that?
>
> [ALYSSA]: Yes.
>
> THE COURT: Okay. And from my previous review of that file and your testimony today, you believe it is in

[4]Two witnesses testified that Alyssa did have actual knowledge of the hearing date. Deborah, portions of whose testimony on August 10 the court declared "not credible in light of her prior testimony," testified that Zoie's father, Christopher J., had called Alyssa two to three weeks before the adoption hearing and had told Alyssa the hearing date was April 6. Called as a rebuttal witness, Christopher testified that he had called Alyssa "almost immediately" after receiving notice on March 21, 2009, of the scheduled adoption hearing and had "read the paperwork to her."

Zoie's best interest, your child's best interest, that your folks, Mr. and Mrs. B[.], adopt her; is that correct?

[ALYSSA]: Yes.

THE COURT: Okay. And you believe that is in your best interest, as well?

[ALYSSA]: Yes.

THE COURT: Okay. And you are asking the Court to accept your consent and grant the order of adoption when we set it for formal hearing; is that correct?

[ALYSSA]: Yes.

THE COURT: Okay. Now, just for legal purposes, you need to be advised that you certainly have the right to appear and be present when that matter is scheduled. You certainly have the right, under Arizona law, to change your position prior to the final hearing, if you determine that you do not believe it is in your daughter's best interest.[5] But at this time, it will be the order of the Court preserving her testimony for the adoption record, [counsel].

[COUNSEL]: Thank you, Your Honor.

THE COURT: Do you have any questions, [Alyssa]?

[ALYSSA]: No.

. . . .

[5]Because § 8-106(D) makes a consent to adoption "irrevocable unless obtained by fraud, duress or undue influence," the court was mistaken in telling Alyssa she could revoke her consent before the adoption hearing if she determined it was not in Zoie's best interest to be adopted by Deborah and Danny. It similarly was mistaken in stating during the first day of the evidentiary hearing on Alyssa's motion to set aside the adoption that "the Court must view everything, including the testimony [at the evidentiary hearing], in a light most favorable to the Petitioner, [Alyssa]." By virtue of Rule 85(D), Ariz. R. P. Juv. Ct., the burden was Alyssa's "to prove the allegations contained in the motion by clear and convincing evidence."

> THE COURT: The record should reflect that in AD200900004, consent to adoption has been filed with the Court on January 23, 2009, signed by Ms. Alyssa Joy C[.], that being before a notary public, and states exactly what you have stated to the Court. So that has been filed, [counsel]. That is filed and the Court takes judicial notice it was filed on January 23, 2009. Anything further, [counsel]?
>
> [COUNSEL]: No, sir.

¶8 Because Alyssa thus personally, expressly, and under oath had waived her appearance at the formal adoption hearing, we agree with the grandparents' contention that her explicit oral waiver obviated any need for the written waiver of notice of the hearing that otherwise was required. Section 8-111(4) required Alyssa be given notice of the adoption hearing "as provided for the service of process in civil actions . . . unless consent with a waiver of notice of hearing ha[d] been filed before the hearing." § 8-111(4). But a person unquestionably can waive the issuance or service of process in a civil action. *See, e.g.*, Ariz. R. Civ. P. 4(f) (person entitled to service of summons or other process "may accept service, or waive issuance or service thereof, in writing" or may "enter an appearance in open court"; "[s]uch waiver, acceptance or appearance shall have the same force and effect as if a summons had been issued and served").

¶9 Self-evidently, the purpose of providing notice of a hearing is to allow the person entitled to the notice to appear at the hearing. "The purpose of notice is only to give a party an opportunity to be heard, and if [s]he has full knowledge of the situation there is no reason why [s]he should not be permitted to waive that notice." *In re Taylor's Estate*, 56 Ariz. 273, 282, 107 P.2d 217, 221 (1940). *Cf. In re Estate of Ivester*, 168 Ariz. 323, 327, 812 P.2d 1141, 1145 (App. 1991) ("The general rule is that one having actual

notice is not prejudiced by and may not complain of the failure to receive statutory notice."). Because Alyssa had consented to Zoie's adoption and, while under oath, expressly had waived her appearance at the adoption hearing, there was no purpose to be served by giving her formal notice of a hearing she had already waived her right to attend. To require that she either have received written notice of the hearing or have executed a written waiver of notice would have been an empty formality under the circumstances of this case. As a result, we conclude the court's factual finding that Alyssa had not been served with notice of the adoption hearing did not, as a matter of law, support its order setting aside the adoption decree.

¶10 Alyssa testified on July 21, 2009, at the evidentiary hearing on her motion to set aside, that she had only been "pretending" on February 23 to waive her appearance at the adoption hearing and had lied to the court on that occasion because Deborah had told her the adoption petition "was being dropped" after Christopher's parental rights were terminated. But the juvenile court made no findings concerning the validity or effect of Alyssa's sworn, oral waiver of her appearance at the adoption hearing. In the absence of any express, written findings as required by Rule 85(G), we cannot assume the court tacitly determined Alyssa's oral waiver of her right to attend the forthcoming adoption hearing was invalid as the result of misrepresentation, mistake, coercion, undue influence, or otherwise.

¶11 The grandparents' opening brief suggests they believe the juvenile court also implicitly concluded that Alyssa's notarized consent to adoption was invalid or at least revocable. *See* § 8-106(D). But the court's written ruling is silent with respect to

the validity of the consent Alyssa executed on January 6, 2009, and that issue is separate and distinct from the question whether Alyssa received, or had waived her right to receive, notice of the April 6 hearing on Deborah's and Danny's petition to adopt Zoie. The juvenile court's conclusion that noncompliance with the notice requirement of § 8-111(4) deprived it of jurisdiction to enter the adoption decree neither addressed nor resolved the primary issue raised in Alyssa's motion to set aside the adoption.

¶12 Pursuant to A.R.S. § 8-106(D), "[a] consent to adopt is irrevocable unless obtained by fraud, duress or undue influence." *Accord In re Navajo County Juv. Action No. JA-691*, 171 Ariz. 369, 374, 831 P.2d 368, 373 (App. 1991) ("[A] consent to adoption cannot be revoked just because the natural parent changes his or her mind."). *See also Yuma County Juv. Action Nos. J-81-339 & J-81-340*, 140 Ariz. 378, 382, 682 P.2d 6, 10 (App. 1984) ("A mere change of mind is insufficient. Once the adoptive process has begun, the integrity of the adoption process must have some degree of protection. Otherwise, in every case the adoption process would be subject to interruption at the whim of the natural parent."). If, in fact, the juvenile court concluded the adoption decree also should be set aside because the consent to adopt had been obtained through fraud, duress, or undue influence, its minute entry failed to satisfy Rule 85 by setting forth findings to that effect. Consequently, there has been no legal ruling that Alyssa's consent to adoption is invalid.

¶13 Because we conclude Alyssa's waiver of her right to appear at the adoption hearing was also, in practical effect, a waiver of the right to receive notice of that hearing,

the juvenile court's decision to set aside the adoption decree based on noncompliance with § 8-111(4) was erroneous as a matter of law.

¶14 But, because the juvenile court expressly declined to address the merits of Alyssa's other ground for setting aside the adoption decree—that her consent to the adoption was invalid because it was fraudulently obtained—we remand this matter for the court to consider that issue. Accordingly, we vacate the court's order of August 19, 2009, and remand for further proceedings consistent with this decision.[6]

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GARYE L. VÁSQUEZ, Judge

[6]At the conclusion of the evidentiary hearing on Alyssa's motion to set aside the adoption, the juvenile court commented that "there is no good resolution to this matter. There is going to be a family fractured . . . as a result of the Court's decision, one way or the other." It further observed:

> [T]he other thing I'd like to put on the record, while the Court has the unique opportunity to observe witnesses during the trial and testimony, I don't recall, in all my years on the bench, where as each party is testifying, there's so many negative head shakes by the other party. And, I mean, there's been significant head shakes by both parties.
>
> So, obviously, this is an emotional hearing. There is belief as to the positions asserted by both parties.

Given those observations, and given the wide disparity in the witnesses' versions of events, we direct the juvenile court's attention—should any further proceedings ensue with respect to this adoption—to the rules committee's comment following Rule 85: "The court is urged to consider the appointment of a guardian ad litem for the child to assist the court in determining whether the child is dependent and whether it is in the child's best interest to set the adoption aside."

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge